IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

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| LISETTE ENTERPRISES, LTD.,<br><br>Plaintiff,<br><br>v.<br><br>REGENT INSURANCE COMPANY, a member of QBE North America,<br><br>Defendant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Case No. 4:20-cv-00299-SMR-CFB<br><br><br><br><br>ORDER ON DEFENDANT'S MOTION TO DISMISS |

Plaintiff Lisette Enterprises, Ltd. is in the restaurant business and took out a business interruption insurance policy from Defendant Regent Insurance Company. Then public health measures responding to a global pandemic shut down in-person dining statewide. Plaintiff seeks coverage for income lost from ceasing its operations; Defendant contends the language of the insurance policy precludes recovery for business losses resulting from the pandemic as a matter of law. The Court agrees coverage does not extend to the circumstances pleaded by Plaintiff. Even if it did, the policy language plainly excludes recovery. For those reasons, Defendant's Motion to Dismiss, [ECF No. 4], is GRANTED.[1]

## I. BACKGROUND

Plaintiff is an Iowa company conducting business as Lucca Restaurant in the East Village of Des Moines, Iowa. *See* [ECF No. 1-1 ¶¶ 2–3]. Defendant, a Wisconsin-based property and casualty insurer, issued Plaintiff an "all-risk" commercial insurance policy to

[1] The parties requested a hearing on Defendant's Motion, but the Court concludes the matter can be resolved without oral argument. *See* LR 7(c).

cover, among other things, the interruption of its business. *Id.* ¶ 11; *see generally* [ECF No. 4-2] (the "Policy").[2]

The Policy broadly extends coverage to "direct physical loss or damage to Covered Property at the [insured] premises . . . caused by or resulting from any Covered Cause of Loss," which is defined as "[d]irect physical loss." [ECF No. 4-2 at 18, 19] (Policy § I(A)(3)). Relevant here, the Policy extends additional coverage to "Business Income":

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration." The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss.

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[2] For the purpose of Defendant's Motions to Dismiss, the Court accepts as true the factual allegations in the Petition, but it need not accept as true any legal conclusions contained therein. *See Brown v. Medtronic, Inc.*, 628 F.3d 451, 459 (8th Cir. 2010) (indicating courts must accept as true the plaintiffs' factual allegations, but they need not accept as true their legal conclusions). At the pleadings stage, the Court's review is limited to the pleadings themselves. But "documents 'necessarily embraced by the complaint' are not matters outside the pleading." *Enervations, Inc. v Minn. Mining & Mfg. Co.*, 380 F.3d 1066, 1069 (8th Cir. 2004) (citations omitted). And documents incorporated by reference, items necessarily "integral to the claim," and matters "subject to judicial notice" or of public record may properly be considered in evaluating whether a complaint states a claim for which relief may be granted. 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed.).

The excerpt of the Insurance Policy accompanying the Petition and included in full as an exhibit to Defendant's Motion "is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c); *see also Enervations*, 380 F.3d at 1069 (considering written agreement alleged to have amended contractual relations between the parties). The Court also takes judicial notice of the Covid-19 pandemic and the official responses by state and federal government officials. The two affidavits supporting Plaintiff's preferred interpretation of the Policy language, however, are essentially expert reports and are neither "part of the public record" nor "necessarily embraced by the pleadings." *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999) (citations omitted); *see generally* [ECF Nos. 13-1; 13-2]. The Court does not consider these extrinsic materials in evaluating the sufficiency of the pleadings or construing the Policy language. *Cf.* Fed. R. Civ. P. 12(d).

*Id.* at 24 (Policy § I(A)(5)(f)(1)(a)). Similarly, Defendant agreed to reimburse "necessary Extra Expense[s]" that would not have been incurred but for the "direct physical loss or damage to the property at the described premises" if the loss or damage is "caused by or result[s] from a Covered Cause of Loss." *Id.* at 25 (Policy § I(A)(5)(g)(1)).

In limited circumstances, the Policy also covers Business Income and Extra Expense resulting from the actions of government officials:

> When a Covered Cause of Loss causes damage to property other than the property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
>
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

*Id.* at 26 (Policy § I(A)(5)(i)).

Excluded from the scope of the Policy, however, is "loss or damage caused directly or indirectly" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *Id.* at 34, 37 (Policy § I(B)(1)(j)(1)). The "Virus Exclusion," like all exclusions under the Policy, includes an anti-concurrent clause and applies to exclude coverage under its terms "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at 34.

In December 2019, a novel coronavirus—now known as Covid-19—was discovered in Wuhan, China. Covid-19 is a highly contagious virus that is disseminated largely through airborne droplets absorbed through the respiratory system via person-to-person contact. *See* [ECF No. 1-1 ¶ 41]. It spread quickly. The first case in the United States was reported in January 2020. *Id.* ¶ 38. The World Health Organization proclaimed the outbreak a pandemic on March 11, 2020, and on March 13, 2020, the federal government declared a national emergency. *Id.* ¶ 47–48.

Iowa Governor Kim Reynolds issued a Proclamation and Order on March 17, 2020, temporarily closing all bars and restaurants for dine-in or in-person service. *Id.* ¶ 49; *see also* [ECF No. 4-3 at 2–3] (the "March 17 Proclamation"). However, the Proclamation allowed dining establishments to sell food and drink "on a carry-out or drive-through basis" or if delivered off-premises. [ECF No. 1-1 ¶ 49]. Even though the Governor's order allowed limited restaurant services to continue, Plaintiff completely suspended its operations because its business could not run in an economical fashion solely on a take-out or delivery basis. *Id.* ¶ 51. Plaintiff maintains it did not close its business or cease operations because of the novel coronavirus, but because of the Governor's Proclamation and Order. *Id.* ¶¶ 15, 17. And it expressly denies the virus was ever physically present on its property or the premises of its insured facility. *See id.* ¶ 34.

Defendant denied coverage in a letter dated August 18, 2020. *Id.* ¶¶ 21–22; *see also* [ECF No. 1-1 at 22–24]. Plaintiff sues for declaratory judgment that its losses are covered under the Policy and seeks to recover from Defendant for breach of contract and bad faith. Defendant moves to dismiss this case on its pleadings.

## II. STANDARD OF REVIEW

The Federal Rules of Civil Procedure require a complaint to present "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Conversely, a complaint is subject to dismissal when it "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To meet this standard, and thus survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). All reasonable inferences must be drawn in the plaintiff's favor, *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009), but "[t]he facts alleged in the complaint 'must be enough to raise a right to relief above the speculative level,'" *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009) (quoting *Drobnak v. Andersen Corp.*, 561 F.3d 778, 783 (8th Cir. 2009)).

## III. ANALYSIS

### *A. Policy Coverage*

The Court turns first to the scope of coverage under the Policy, which the parties agree is governed by Iowa law.[3] Iowa recognizes insurance policies as contracts of adhesion and therefore construes their language in the light most favorable to the insured. *T.H.E. Insurance Co. v. Estate of Booher*, 944 N.W.2d 655, 662 (Iowa 2020). Exclusions are strictly construed

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[3] Both parties produced voluminous recitations of Covid-19 business interruption insurance cases ongoing throughout the country. Few applied Iowa law, and many involved policy language different from that at issue in this litigation. *See, e.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, Civ. Action No. 2:20-cv-265, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828 (C.D. Cal. 2020); *Malaube, LLC v. Greenwich Ins. Co.*, Case No. 20-22615-Civ-WILLIAMS/TORRES, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020).

against the insurer. *Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 502 (Iowa 2013); *Bituminous Cas. Corp. v. Sand Livestock Sys., Inc.*, 728 N.W.2d 216, 220 (Iowa 2007). Policy language is interpreted "from a reasonable rather than a hypertechnical viewpoint." *Boelman*, 826 N.W.2d at 502 (citing *Steel Prods. Co. v. Millers Nat'l Ins. Co.*, 209 N.W.2d 32, 36 (Iowa 1973)).

"Generally speaking, the plain meaning of the insurance contract prevails." *Booher*, 944 N.W.2d at 662. "Ambiguity exists if, 'after the application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty results as to which one of two or more meanings is the proper one.'" *Cairnes v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987) (citation omitted). But "[a]n insurance policy is not ambiguous . . . just because the parties disagree as to the meaning of its terms," *Boelman*, 826 N.W.2d at 502. Courts are not to "'write a new contract of insurance between the parties' when there is no ambiguity" and must "avoid straining the words and phrases of the policy 'to impose liability that was not intended and was not purchased.'" *Cairns*, 398 N.W.2d at 824 (citation omitted).

Under Iowa law, the party seeking coverage under an insurance policy has the burden of demonstrating that a claim falls within the policy's terms. *Am. Guar. & Liab. Ins. Co. v. Chandler Mfg. Co., Inc.*, 467 N.W.2d 226, 228 (Iowa 1991). The insurer bears the burden of demonstrating that a coverage exclusion applies. *Postell v. Am. Family Mut. Ins. Co.*, 823 N.W.2d 35, 41 (Iowa 2012).

1. Business Income Coverage

Looking first to the Business Income provision, Plaintiff alleges it suffered "direct physical loss of or damage to property" at its facility when the Governor prohibited restaurants

and bars from operating in-person or dine-in services, causing it to suspend its operations and lose revenue compensable under the Policy. To fall within Business Income coverage, the suspension of Plaintiff's business "must be caused by direct physical loss of or damage to property" at its insured facility. But such physical loss or damage, itself, "must be caused by or result from a Covered Cause of Loss"—i.e., "direct physical loss." Plaintiff contends the Policy is ambiguous, emphasizing the disjunctive language providing coverage for "loss" *or* "damage." Because the language includes both terms, Plaintiff points out, they must mean different things. And because the Policy does not define "loss," Plaintiff contends it must include something more than the physical destruction or alteration that "damage" connotes. Plaintiff proposes that the phrase includes "loss of use," which it claims to have suffered here when the Proclamation imposed a prohibition of dine-in service.

In *Milligan v. Grinnell Mut. Reinsurance Co.*, the Iowa Court of Appeals confronted a suit-limiting provision in an insurance policy that limited legal challenges to coverage determinations to two years from the date on which "direct physical loss or damage" was sustained. No. 00-1452, 2001 WL 427642, at *1 (Iowa Ct. App. Apr. 27, 2001). Finding the phrase unambiguous, the court rejected the insured's argument that the limitations period ran from the time of claim estimates or repairs:

> [T]he dictionary gives the word loss its commonly understood meaning of damage or destruction. Damage is in turn defined as injury to property. Given the foregoing, it appears that loss or damage as used in the suit-limitation provision unambiguously referred to injury to or destruction of the realty owned by the Insureds.

*Id.* at *2. *Milligan*'s unpublished opinion is the only authority cited by the parties and revealed by the Court's own research where an Iowa state court construed the phrase "direct physical loss or damage."

*Milligan* is only of limited use here, however. That decision was not concerned with language governing policy coverage but defining when the time by which the insured could bring suit to dispute a valuation determination began to run. And it does not appear to have considered the rule that the use of disjunctive phrasing necessitates a list of alternatives or that all words to a contract be given meaning so as to not produce superfluous language. *See Denison Mun. Utils. v. Iowa Worker's Compensation Comm'r*, 857 N.W.2d 230, 236 (Iowa 2014) (rule on disjunctive language); *Fashion Fabrics of Iowa, Inc. v. Retail Inv'rs Corp.*, 266 N.W.2d 22, 26 (Iowa 1978) (rule against surplusage). The insureds had argued the phrase "direct physical loss or damage" could mean "the date they received their repair estimates, the date the building was gutted[,] or the date the repairs commenced." *Milligan*, 2001 WL 427642, at *2. The distinction between the terms was never at issue and had no bearing on issue of when such "loss" or "damage" was sustained.

Nevertheless, the case is consistent with the principle that coverage for "loss" or "damage" under Iowa law at least requires the presence of a physical condition on or affecting the property located at the insured premises. Indeed, the *Milligan* Court found persuasive that the compensable "loss" or "damage" suffered "must be physical in nature" to trigger the suit-limitations period and that the policy's use of those terms "clearly indicate[s] the necessity of a destructive act or occurrence." *Id.* Plaintiff's position to the contrary ignores that even a distinct definition of "loss" must be "physical" under the Policy language. Indeed, "[w]hile a loss of use may, in some cases, entail a physical loss," it does not follow that the

terms are synonymous; "interpretation of physical loss as requiring only loss of use stretches 'physical' beyond its ordinary meaning and may, in some cases[,] 'render the word "physical" meaningless.'" *The Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 825 (S.D. Iowa 2015) (citing *Source Food Tech., Inc. v. U.S. Fidelity & Guar. Co.*, 465 F.3d 834, 835 (8th Cir. 2006); *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005)); *accord Seifert v. IMT Ins. Co.*, Civ. No. 20-1102 (JRT/DTS), 2020 WL 6120002, at *3 (D. Minn. Oct. 16, 2020). Nowhere does Plaintiff plead the *physical* loss of use of the property at its insured premises, just its *beneficial* or *intended* use; in fact, Plaintiff disclaims the Covid-19 virus was ever physically present at its premises at any time. Plaintiff's concession precludes a finding of "direct physical loss of or damage to property" at its restaurant to trigger Business Income coverage. *See Palmer Holdings & Invs., Inc. v. Integrity Ins. Co.*, No. 4:20-cv-154-JAJ, 2020 WL 7258857, at *10 (S.D. Iowa Dec. 7, 2020) ("Even if loss and damage are distinct, the physicality requirement of the loss or damage remains, and Plaintiffs have failed to allege a tangible loss or alteration to property that is sufficient to trigger coverage under the Business Income provision."); *accord Seifert*, 2020 WL 6120002, at *3 (observing Minnesota law "does not require a showing of structural damage to qualify for coverage" for "directly physical loss," but "[a]ctual physical contamination of the insured property is still required. Simply claiming 'mere loss of use or function' is not enough").

Plaintiff insists its definition of "loss" is a reasonable reading of the Policy language by pointing to the Policy's definition of "property damage" to include "[p]hysical injury to tangible property, including all resulting loss of use of that property" as well as "[l]oss of use of tangible property that is not physically injured." [ECF No. 4-2 at 67] (Policy § II(F)(17)). But this definition applies to Liability Coverage—a wholly separate section of the Policy

covering Plaintiff's legal exposure to injury caused to third parties like customers who patronize its dining establishment. And even if the definition did apply, it is not clear how the definition helps Plaintiff. The crux of Plaintiff's argument is that the disjunctive language in the phrase "physical loss of or damage to" requires "loss" and "damage" to mean different things. But the inclusion of "loss of use" in the Policy's definition of "property damage" undermines that very premise. Plaintiff cannot genuinely assert there is an ambiguity that renders its interpretation reasonable if Plaintiff's proposed interpretation contains the same flaw it claims renders the Policy language ambiguous.

But suppose Plaintiff has the right of it—that the loss of use suffered as a result of a business suspension need not relate to some physical presence or invasion of that property to qualify as "direct physical loss of or damage to property." Plaintiff's position still fails. The Policy additionally requires "direct physical loss" to be the *cause* of the loss of use (i.e., a "Covered Cause of Loss"). *Cf. Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020) ("The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure."). Plaintiff pleads nothing physical that directly *caused* Plaintiff's partial loss of use of its property at the restaurant premises when it was forced to cease in-person dining.[4] To the contrary, Plaintiff pleads the Governor's

[4] The Court's conclusion that the Covid-19 pandemic contributed to Plaintiff's loss and excludes coverage under the Virus Exclusion, below, is not inconsistent with this reasoning. Coverage under the Business Income provision requires that the physical loss be "direct." The Virus Exclusion, by contrast, excludes coverage of any loss or damage suffered at the hands of a virus regardless of its role in the chain of causation or existence of other contributing causes.

Proclamation closing bars and restaurants for in-person dining did. [ECF No. 1-1 ¶¶ 17, 34]. Thus, even if Plaintiff's "loss of use" of its property resulting from operational suspension could be considered to be "physical," the cause of that lost use was not.

Plaintiff cannot establish a claim for coverage under the Business Income provision.

2. Civil Authority Coverage

Plaintiff does not state a viable claim demonstrating coverage extends under the Civil Authority provision for similar reasons. Civil Authority coverage is activated only when government officials respond to "direct physical loss" inflicted on surrounding property in a way that "prohibits access to the [insured] premises." Plaintiffs plead no facts, however, that the virus was physically present on specific property surrounding its premises or that the Governor's Proclamation was directed at the resulting condition of such property. This fact, alone, distinguishes this case from those relied on by Plaintiff. *See, e.g.*, *US Airways, Inc. v. Commonwealth Ins. Co.*, No. 03-587, 2004 WL 1094684, at *5 (Va. Cir. Ct. May 14, 2004) (holding a reasonable jury could find business interruption insurance coverage from closure of airfield ordered by civil authority responding to the terrorist attack on September 11, 2001); *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (Mich. Ct. App. 1973) (concluding civil authority coverage applied where the governor imposed a curfew in response to a riot in the insured's neighborhood).

Nor does Plaintiff plead facts establishing that the Governor's March 17 Proclamation prohibited access to its insured premises. The Policy is unequivocal that the civil authority must "prohibit access"; the Proclamation only prohibited a particular use. *See Access*, Black's Law Dictionary (11th ed. 2019) ("A right, opportunity, or ability to enter, approach, pass to and from, or communicate with."). Plaintiff's argument otherwise attempts to create an

ambiguity where one does not exist by re-writing the Policy language to insist on terms—"all" access versus "partial" access—that are not there. Their absence does not render the Civil Authority provision ambiguous.

3. The Virus Exclusion

Even if coverage extends under the Business Interruption or Civil Authority provisions, Plaintiff's claim is rendered non-compensable by the Virus Exclusion. The Policy specifically and explicitly excludes from coverage loss or damage caused by "[a]ny virus." The exclusion applies whenever a virus is the "direct[] or indirect[]" cause. And it excludes resulting loss or damage "regardless of any other cause or event that contributes concurrently or in any sequence to the loss."

Plaintiff's efforts to distance its closure from the pandemic is fruitless. A viral pandemic hit the United States. Iowa's Governor issued the March 17 Proclamation prohibiting in-person dining. Plaintiff shut down its business. The virus played a part in Plaintiff's closure. The Virus Exclusion therefore applies. That Plaintiff asserts (but conspicuously does not plead) it would have continued operating its restaurant despite the presence of Covid-19 is immaterial. But-for the pandemic, the Governor would not have issued her Proclamation; but-for the Proclamation, Plaintiff would not have ceased its business operations. The virus is present within the chain of causation—directly or indirectly.[5] *See Amish Connection, Inc. v. State Farm Fire & Cas. Co.*, 861 N.W.2d 230, 241 (Iowa 2015) ("The anticoncurrent-cause language in [the insurance] policy is enforceable.").

[5] Plaintiff cites *Urogynecology Specialist of Fla., LLC v. Sentinel Ins. Co., Ltd.*, 489 F. Supp. 3d 1297 (M.D. Fla. 2020), for the proposition that the "unique circumstances" of Covid-19 do not apply to the Virus Exclusion. The policy in that case excluded loss caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungi,' wet rot, dry rot,

In the face of this obvious conclusion, Plaintiff attacks the propriety of the Virus Exclusion by invoking the doctrines of "regulatory estoppel," unclean hands, breach of good faith and fair dealing, and appeals to "general public policy." Plaintiff alleges that in 2006, two industry groups misrepresented to Iowa insurance regulators considering the provision that inclusion of the Virus Exclusion would not change the scope of coverage because coverage for disease-causing agents had never been in effect and was never intended to be included in business-interruption policies. *See* [ECF No. 1-1 ¶¶ 61–68]. These representations were false, it claims, because courts had in fact found coverage for such instances. *See, e.g.*, *Sentinel Mgmt. Co. v. Aetna Cas. & Ins. Co.*, 615 N.W.2d 819, 825–26 (Minn. 2000) (affirming that covered "direct physical loss" occurred due to health hazard created by asbestos contamination in residential buildings). Plaintiff argues Defendant should be estopped from enforcing the Virus Exclusion due to these misrepresentations.

Even if Iowa law recognized the doctrine of regulatory estoppel, it would not apply. The elements of the doctrine require that (1) the party to be estopped "made a statement to a regulatory agency" and (2) later "took a position opposite to the one presented." *Simon Wrecking Co. v. AIU Ins. Co.*, 541 F. Supp. 2d 714, 717 (E.D. Pa. 2008). Nothing about the statements made by the industry groups, even if they can be attributed to Defendant, is inconsistent with Defendant's position here: that the intent of the business interruption policy language was not to provide coverage for disease-causing agents. Plaintiff does not advance any further argument regarding why the Virus Exclusion should be cast aside under the

bacteria or virus" and is inapposite here. *See id.* at 1301. That language does not appear in the Policy in this case and extends materially different coverage than that at issue here.

doctrines of unclean hands, good faith and fair dealing, and public policy. The Court holds it should not.

4. Reasonable Expectations

Last, Plaintiff asserts it at least had a reasonable expectation that the its losses suffered at the hands of the Covid-19 pandemic would be covered by the Business Income or Civil Authority provisions of the Policy and should be compensated accordingly. Under Iowa law, the reasonable expectations doctrine applies to reform an insurance policy only when an exclusion "(1) is bizarre or oppressive, (2) eviscerates terms explicitly agreed to, or (3) eliminates the dominant purpose of the transaction." *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963, 972 (8th Cir. 2013) (citation omitted). But the doctrine "does not expand coverage on a purely equitable basis." *Boelman*, 826 N.W.2d at 505. To reform an insurance policy to conform to the insured's reasonable expectations, "the insured must prove 'circumstances attributable to the insurer that fostered coverage expectations' or show that 'the policy is such that an ordinary layperson would misunderstand its coverage.'" *Nationwide Agri-Bus. Ins. Co. v. Goodwin*, 782 N.W.2d 465, 473 (Iowa 2010) (citation omitted); *see Clark-Peterson Co., Inc. v. Independent Ins. Assocs., LTD*, 492 N.W.2d 675, 677 (Iowa 1992).

Plaintiff fails to do so. The Virus Exclusion is clear: it applies to loss or damage caused—directly or indirectly—by "[a]ny virus . . . capable of inducing physical distress, illness or disease," whether or not there is "any other cause" contributing at any time to the loss. An ordinary layperson should have no difficulty understanding the scope of the exclusion. Nor has Plaintiff pleaded any circumstances induced by Defendant that fostered such expectations of coverage in times like these. And even if it were so, Plaintiff has not

alleged facts that demonstrate the policy language is bizarre or oppressive, that it eviscerates terms explicitly agreed to, or that applying the exclusion would eliminate the dominant purpose for coverage.

In closing, Plaintiff asks why any business would purchase Business Income or Civil Authority insurance coverage that does not cover its current condition. The simple answer: because other circumstances could befall Plaintiff's business that are covered by the policy; just not this one. The Court is not without sympathy for this country's small business owners—particularly those in the restaurant business. The country has seen entire neighborhoods crushed under the pandemic's impact. Very few experts in the world could have accurately predicted the long-term economic devastation the pandemic has wrought. But the Court cannot change the law or the policy language at issue here. The Virus Exclusion unambiguously precludes coverage under the facts pleaded by Plaintiff. Plaintiff fails to state a claim for declaratory judgment of coverage under the Policy.

*B. Breach of Contract*

To recover on its claim for breach of contract, Plaintiff must plead sufficient facts demonstrating Defendant breached its obligations under the terms and conditions of the agreement. *See Iowa Arboretum, Inc. v. Iowa 4-H Found.*, 886 N.W.2d 695, 706 (Iowa 2016). Because Plaintiff fails to establish that the terms and conditions of the Policy language extend coverage under the circumstances pleaded in the Petition, Plaintiff fails demonstrate Defendant violated the Policy when it declined to provide policy benefits. Because the Court concludes the Policy does not extend Business Income or Civil Authority coverage to the facts pleaded by Plaintiff and coverage would otherwise be excluded by the Virus Exclusion, Plaintiff fails to state a claim for breach of contract.

### *C. Bad Faith*

Finally, Plaintiff alleges Defendants engaged in bad faith when denying its claim for insurance coverage related to its lost business income from the Covid-19 pandemic. To state a claim for bad faith under Iowa law, Plaintiff must establish (1) Defendant "had no reasonable basis" to deny benefits under the Policy and (2) Defendant "knew, or had reason to know, that its denial was without basis." *United Fire & Cas. Co. v. Shelly Funeral Home, Inc.*, 642 N.W.2d 648, 657 (Iowa 2002). "A reasonable basis exists for denial of policy benefits if the insured's claim is fairly debatable either on a matter of fact or law." *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005).

Plaintiff fails to plead facts establishing coverage was not "fairly debatable." To the contrary, Defendant makes a strong case demonstrating that coverage is at least precluded by the Virus Exclusion. The Proclamation states, unequivocally, that its in-person dining restrictions were the result of the Covid-19 pandemic and that "reports forwarded by federal, state, and local officials indicate that state assistance is needed to manage and contain this outbreak" by "separating and restricting the movement of persons known or suspected to have the disease, or who have been exposed to those known or suspected to have the disease." [ECF No. 4-3 at 1]. And it was the Proclamation that Plaintiff claims caused it to cease operating. The virus-induced pandemic clearly played a role in causing Plaintiff's lost income. Plaintiff therefore fails to state a claim for bad faith.[6]

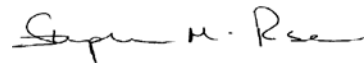
[6] The Petition also alleges Defendant "failed to investigate Plaintiff's claim" as required by Iowa Code § 507B.4 and Iowa Administrative Code § 191-15.41. [ECF No. 1-1 ¶ 100]. Iowa courts have long held that chapter 507B does not give rise to a private cause of action, precluding a plausible claim for relief. *Bates v. Allied Mut. Ins. Co.*, 467 N.W.2d 255, 260 (Iowa 1991); *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 43 (Iowa 1982).

IV. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss, [ECF No. 4], is GRANTED. The Clerk is DIRECTED to enter judgment in favor of Defendant. This case is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated this 6th day of May, 2021.



STEPHANIE M. ROSE, JUDGE
UNITED STATES DISTRICT COURT